

Attorneys admitted in
California, New York,
Texas, Pennsylvania, and
Maine

Sender's contact:
stephen@donigerlawfirm.com
(310) 590-1820



Doniger / Burroughs Building
603 Rose Avenue
Venice, California 90291

Doniger / Burroughs NY
247 Water Street, First Floor
New York, New York 10038

June 20, 2023

DELIVERED VIA ECF

The Honorable Louis L. Stanton
Thurgood Marshall Courthouse
40 Foley Square, Courtroom 219
New York, NY 10007

Case Title: *Freeman v. Deebs-Elkenaney et al,*
1:22-cv-02435-LLS-SN
Re: **Request for Pre-Motion Conference re Plaintiff's
contemplated motion for summary judgment.**

Dear Judge Stanton:

We write on behalf of Plaintiff Lynne Freeman pursuant to Your Honor's Individual Rule 2.A and Federal Rule 56 to request a pre-motion conference for a motion for summary judgment on Ms. Freeman's copyright infringement claims. Plaintiff believes that expert discovery should be completed in an orderly and timely manner so that she can proceed to establish Defendants' infringement.

I. Background

In December of 2010, Ms. Freeman hired Defendant Emily Sylvan Kim of Prospect Agency, LLC as her literary agent to find a publisher for her Blue Moon Rising ("BMR") manuscript. Over the next 3-4 years Kim actively worked with Freeman to edit the story, generating dozens of revised manuscripts, and submitted at least one of those iterations to Stacy Abrams at Defendant Entangled. Several years later, Kim, acting as the literary agent for Defendant Deebs-Elkenaney pka Tracy Wolff ("Wolff"), negotiated the contracts with Defendant Entangled for Wolff to write the *Crave* book series. Kim was actively involved in that writing, including staying up with Wolff for a 19-hour writing spree on one of the books, and Stacy Abrams is listed in both *Crave* and *Crush* as an editor.

Crave was published in April of 2020. Since then, Defendants published the sequel novels *Crush*, *Covet*, and *Court* (collectively the *Crave* series). The *Crave* series bears striking similarity to Freeman's BMR work, with the various storylines of BMR pulled out one-by-one and used as the basis of the various *Crave* books. Characters, scenes, and the overall plot of the two works are impossibly similar. While it is challenging to summarize those similarities succinctly as they are spread across at least six iterations of *BMR* manuscripts (totaling approximately 2,650 pages) and are used in the 2,750 pages of the first four *Crave* books, below is a sampling of those similarities:

- A. *The cast of characters is remarkably similar.* Both books include:
- i. The heroine is a girl, approximately 17-years old, originally from San Diego who moved to Alaska after an “accident” killed her family, and she now suffers panic attacks and has anxiety from the trauma. She feels guilty about her family members’ deaths because they had a fight before the accident. She now lives with the only two remaining relatives she believes she has left, who are both supernatural witches, although she doesn’t discover this until later. She will later learn she has a grandmother, and a father (BMR) / grandfather (Crave) who are parallel characters. She believes she is human, as does most everyone else, but later learns she is not only supernatural, but the most powerful being born in 10 generations (BMR) / 1,000 years (Crave). She is also a queen and the descendant of a twin goddess. Her family used tea to bind her power to keep her ignorant of being supernatural and of the supernatural world in order to protect her. She is an avid reader, takes advanced classes in school, quotes literature, quotes Shakespeare, and talks about French philosophers. She drinks tea often, has a favorite food from a Mexican restaurant, loves chocolate chip cookies, and locks her feelings of anxiety in a box. She thinks that Alaska feels like the moon.
 - ii. Both heroines hear voices speaking to them in their heads which come from parallel characters. One voice in the head of each heroine is the heroine’s long-lost father/grandfather (Athair in BMR, Alastair in Crave). Both speak Gaelic, their kind communicate telepathically, and the heroine first meets them physically on an island which she visits by portal. This character is stuck in his supernatural form, is in chains, and was put there by the ultimate villain in the story, the vampire prince (BMR) / the vampire king (Crave series). The heroine cannot free him when they meet. She promises him she’ll be back.
 - iii. The romantic leads have very similar physical descriptions, even being described as smelling the same (of citrus and waterfalls (BMR) or oranges and fresh water (Crave)). His scent is particularly appealing to the heroine and she thinks about it often. The romantic lead feels responsible for the death of his older brother (who was 19 in BMR and looks 19 in the *Crave* series). The heroine can see the pain in his eyes and recognizes it as being like her own, that he, too, has suffered a loss. His parents are leaders among their kind. The romantic lead feels he has a duty to stop the supernatural war between the races of beings and is actively trying to do so. He wears designer clothing and wears black jeans and a t-shirt when meeting the heroine for the first time. He also wears a black V-neck sweater. The heroine and romantic lead first encounter one another in the first school scene in the books at the end of chapter two. He tries to resist his attraction to her because he believes that being with him will put the heroine, whom he believes to be a human girl, in danger. At the end of their first meet day scene, the romantic lead warns her about it not being safe for her. It’s the last thing he says to her that day.
 - iv. The heroine’s best guy friend in both books is of mixed race, part Black, with warm brown skin, and is gay—and the heroine is the only person he has told. He laughs and jokes with the heroine, has a smile he is known for, and calls her nicknames (BMR) a nickname (Crave). The romantic lead doesn’t like this character being around the heroine and stares him down several times

throughout the story. The heroine believes it's because the romantic lead is jealous. This character is a supernatural being with wings. The heroine thinks he is beautiful in his supernatural form. He "waggles his brows at" the heroine.

- v. There are also other parallel family members, the childhood best friend (Amanda / Macy who is a cheerleader in BMR and a dance team member with pom poms in *Crave*), the nemesis female character (Taylor / Lia who spikes the heroine's drink and is out to get her), the ultimate villain of the story (vampire prince Julian / vampire king Cyrus who wants war), the outspoken, fashion-forward character whom the heroine admires (Rachel / Eden), and the nasty daughter of the vampire prince / vampire king who turns out to be related to the heroine by blood (Taylor / Isabella). The stories have remarkably similar inner mind and motivations of characters, dialogue, and even shared character names including: The Bloodletter, Marise, Lily, Collin (Colin), Aedan (Aidan), Emma, Gwendolyn (Gwen), and Macy (Mason).
- B. ***The storyline and scenes are remarkably similar:***
- i. The heroine meets the romantic lead, learns about the supernatural world when he loses control of his powers during their first kiss, and discovers that he is a dangerous supernatural being who is trying to stop a supernatural war among the factions of beings, and she is irresistibly drawn to him, even though she doesn't want to be. She realizes she is even drawn to the dangerousness of him which is unusual for her.
 - ii. Both heroines go to parties and imbibe a spiked drink. In Freeman's manuscripts, there is first a Halloween party, where the mean girls are out in full force and the heroine feels uncomfortable and leaves early. Then a bit later in the novel there is a house party, where Freeman's heroine is given a spiked drink by the female nemesis character, wants to leave early, and later feels nauseous, then vomits, falling into "a fitful sleep." (BMR). In Wolff's *Crave*, the time of year is said to be near Halloween ("Halloween wasn't that long ago,"). Wolff creates a slightly different party scene with Grace feeling uncomfortable, and deciding to leave the party, then being given a spiked drink by the female nemesis character, feeling nauseous, and vomiting. Finally, she drifts off into a "fitful sleep."
 - iii. The heroine is kidnapped by a vampire who wants to bring back their dead mate and needs the heroine in order to do so. This vampire believes the heroine will become the reincarnation of his dead mate (BMR) / will be used in a spell to resurrect her dead mate (*Crave*). This vampire wants to use the heroine as an act of vengeance against the person believed to be responsible for their mate's death. This vampire is responsible for the accident that killed the heroine's family members.
 - iv. The heroine learns she is a supernatural being, one who can shift forms, and she turns out to be a unique supernatural being made of magic who is a protector of supernaturals, humans, and other creatures. She has magic in her veins / blood. She is in danger because of what she is, and others are seeking to destroy her so that she can't be used in the supernaturals' war.

- v. In another scene, the heroine is attacked by two supernaturals wearing jeans and t-shirts described as having an eighties rocker look. It is winter, there is snow outside and the two supernaturals are not wearing coats or winter gear and appear unaffected by the cold. They say and do similar things, the shorter attacker in each book restrains the heroine the same way, and she fights back in the same way in both books. She stomps on his feet (BMR) / thinks about stomping on his feet (Crave). She is pinned to him “my back to his front” and the scene plays out with remarkable similarity.
- vi. Freeman’s story ends when the Bloodletter character turns into a raven and flies off into the night sky. Crave ends with the Bloodletter character turning into a winged creature and flying off.

There are far more similarities, and they are of the quantity and type that preclude any colorable claim of independent creation. Of course, both books share tropes like “the evil leader trying to kill the hero/heroine,” but the specific details in their expression are not *scènes à faire* and are so striking as to preclude the possibility of independent creation.

And as if that were not enough, Plaintiff has also secured expert testimony from two renowned forensic linguists, Dr. Patrick Juola and Dr. Carole Chaski.¹ After running a scientifically validated quantitative and computational linguistic analysis on *BMR* and *Crave*, as compared to 10 baseline novels in the same genre, Dr. Juola concluded that the odds of common authorship are 1000:1, which is 99.99%. Using a different and equally reliable methodology comparing lexical clusters, Dr. Chaski concluded with mathematical certainty of over 99.9981% (odds of 10,000,000:19) that the works share common authorship. Copies of those reports are attached for this Court’s convenience as Exhibits “2” and “3.”

II. If Defendants intend to offer rebuttal expert testimony, they should be directed to do so without further delay as they have already had more than enough time to find rebuttal experts.

On May 10, 2023, the deadline for disclosure of initial expert reports under the subsequently abandoned trial schedule (ECF No. 200), Freeman disclosed her expert witnesses. Three of those experts support, *inter alia*, her copyright claims. The first is Professor Kathryn Reiss, who was retained to address Defendants’ incredible argument that the remarkable similarities between the works are solely attributable to tropes or genre conventions. Professor Reiss teaches writing, including educating her students on what conventions are generally included in different genres. For this case, she catalogued the notable similarities in characters, plot, storyline, and scenes and noted where these similarities could not be attributed to tropes or genre conventions. Plaintiff’s other two experts, Drs. Chaski and Juola discussed above, were retained to use quantitative analytics to establish the copying of a portion of Freeman’s work exactly, and the significance of that when compared to a control group of other books in the genre.

Although this is not the time to argue *Daubert* motions, Freeman notes that expert testimony has been held proper and admissible in literary infringement cases at the summary judgment phase on the issue of whether any reasonable jury could find the works substantially similar. *See Currin v. Arista Records*, 724

¹ Dr. Juola, is one of the foremost experts in his field, and roughly a decade ago became quite famous for uncovering that the book “The Cuckoo’s Calling” was in fact authored by Harry Potter creator J.K. Rowling. The book was published under a fictitious name, but after Dr. Juola’s computer analysis was presented to Rowling, she admitted to writing the novel. See <https://www.smithsonianmag.com/science-nature/how-did-computers-uncover-jk-rowlings-pseudonym-180949824>

F.Supp.2d 286, 291 (D. Conn. 2010). Indeed, courts regularly permit expert testimony where comparing the works would be unduly complicated for lay witnesses. *See Computer Associates International, Inc. v. Altai, Inc.* 982 F.2d 693, 713 (2nd Cir. 1992). Given that this case will require a jury to compare the four *Crave* books at issue to multiple versions of Freeman’s work—approximately 5,000 pages of material, this is precisely such a case.

Defendants have already had forty days to find rebuttal experts, and yet there is currently no deadline for them to do so. Defendants have claimed that they need some extended period of time to obtain rebuttal experts, at least with regard to Drs. Chaski and Juola. That claim is baseless. Indeed, Freeman retained Chaski on April 13 – only 4 weeks before providing her report and her finding can be easily verified with publicly available software. If Defendants wish to offer rebuttal testimony, they should do so without further delay so that the Court can consider it at summary judgment.

III. The Court should convene a pre-motion conference or set a summary judgment schedule with briefing due after the completion of expert discovery.

Fact discovery is closed, and expert discovery can and should be completed within the next 30 days or so. Freeman requests a pre-motion conference to determine an appropriate timeline for allowing expert discovery to be completed and summary judgment on her copyright claims to be briefed without further delay. She also requests clarification from the Defendants that they do not intend to seek summary judgment on any other claims, as she does not, so that the parties and the Court can be sure that this case is addressed in as streamlined and efficient a manner as possible.

Thank you for your attention to these issues.

Respectfully submitted,

By: /s/ Stephen M. Doniger
Stephen M. Doniger, Esq.
Scott Alan Burroughs
DONIGER / BURROUGHS PC
For the Plaintiff